

Texas Workers' Compensation Insurance Facility

PETER POTEMKIN
Executive Director

JD #15292
Un-GOV

March 13, 1992

RQ-354

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711-2548

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Opinion Committee

Attn: Opinion Committee

RE: Open Records Request by Counsel for
Back Alley Productions, Inc.

Dear General Morales:

On March 4, 1992, the Texas Workers' Compensation Insurance Facility ("Facility") received an application for information from Mr. Greg H. Walker pursuant to the Texas Open Records Act, Article 6252-17a, V.T.C.S. A copy of the request is attached.

Pursuant to Section 2.11 of Article 5.76-2, Insurance Code, the Facility is a governmental body only for purposes of the Open Meetings Act and the Open Records Act. It is based upon Section 2.11 that we request your decision that the information requested by Mr. Walker is exempt from disclosure under the Open Records Act.

In order to appreciate the matter under consideration, a factual description of the Facility's functions and operations is helpful. The most important function of the Facility is to provide a mechanism for employers to obtain workers' compensation insurance in Texas. This is accomplished through the "employers rejected risk fund" established in Part 4 of Article 5.76-2. Through that fund, an employer who cannot obtain workers' compensation insurance from an insurance company can apply to the Facility for such insurance. If the employer meets the criteria set forth in the statute, and rules of the Facility which have been approved by the State Board of Insurance, the employer can purchase insurance through the Facility.

It is important to note, however, that the Facility is not required to provide credit to employers who apply for insurance. Section 4.02 of Article 5.76-2 permits the Facility to accept installment payments of premium, but does not require that it do so. Further, Section 4.02 (d) expressly authorizes the Facility to refuse to write insurance on an applicant that is a credit risk if the applicant does not pay the total estimated premium and other charges before the policy is issued or provide security for such payment before the policy is issued. A "credit risk" is defined in Section 1.01 of Article 5.76-2 as an employer who is in

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bankruptcy or is not creditworthy. Thus, the Facility, just as any other private entity, is not required to extend credit to applicants for workers' compensation insurance, and can establish criteria to evaluate requests for credit.

Finally, it is important to note that the Facility is subject to the jurisdiction of the State Board of Insurance for certain purposes but it is not regulated by the federal or state agencies which regulate lending institutions. We are unaware of any specific statute or regulation which would require publication of our criteria for granting credit.

We are unaware of any prior Attorney General Open Records Decisions that address the issue of whether our credit underwriting standards and files are exempt from disclosure under the Open Records Act. However, we do note that Open Records Decision No. 523 (1989) held that credit reports and financial statements, as well as statements about a veteran's financial responsibility found on a county evaluation committee's report in connection with an application for a Veterans Land Board loan, were exempt from disclosure pursuant to section 3(a)(1) of the Act. We believe the same treatment should be afforded to the financial information and credit underwriting criteria in question here. The information requested by Mr. Walker involves internal Facility criteria which are applied to financial information gathered both from the applicant and from credit reporting services. The information should be deemed confidential to protect both the financial privacy of the applicant and the integrity of the credit evaluation process.

It is essential that the Facility receive accurate financial information from applicants in order to evaluate their creditworthiness. It is important to remember at this point that applicants to the Facility already have been refused workers' compensation insurance in the voluntary insurance market. Therefore, they feel a compelling need to obtain the insurance, hopefully without having to pay the entire premium, which can be quite substantial, and other charges in a lump sum before the insurance policy is issued. It is our concern that if the Facility's credit underwriting criteria are disclosed applicants may feel compelled to "adjust" the financial statements they submit to the Facility so they can pass the credit underwriting tests of which they are aware. We wish to preserve the integrity of the

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process, by requiring applicants to submit their most accurate financial data, without the temptation to adjust it to meet the credit underwriting criteria.

We further believe the information should be exempt from disclosure under section 3(a)(10) of the Open Records Act. The information should be treated as a trade secret, because it is closely held by the Facility and is known only to the executive management and to the underwriting staff of the Facility. The Facility has not released its credit underwriting guidelines previously. The guidelines are of great importance to the Facility, as they allow the Facility to evaluate the creditworthiness of an applicant. The Facility must make reasonable efforts to grant credit only to applicants who will actually pay any deferred premium, because if the Facility insures persons who do not pay their premium, it faces the prospect of paying compensation to injured workers under the policy terms, without being properly compensated for assuming the risk as insurer. Such a scenario is contrary to the fundamental principle of insurance that an insured pay adequate consideration for the insurer's assumption of the risk.

Further, to hold that the information Mr. Walker requests is not exempt from disclosure could undermine the confidentiality of Facility staff comments and recommendations in evaluating an applicant's creditworthiness. We believe that would be contrary to prior interpretations of section 3(a)(11) of the Open Records Act. That section has been held in prior Open Records Decisions to be designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief with regard to action. Open Records Decisions Nos. 298, 231, 222 (1979) and Austin v. City of San Antonio, 630 S.W.2d 391 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.). Whether to grant credit to an applicant is a policy decision. To require disclosure of all criteria and work papers, as well as the identity and qualifications of all persons involved in the process, would severely hamper the frank and open discussion which is sometimes necessary in evaluating these applications. This Facility must be allowed to maintain an open internal dialogue to deal with the variety of circumstances affecting applicants and their creditworthiness. Therefore, the information requested should be exempt from disclosure.

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For the reasons discussed, we respectfully request that you find the requested information exempt from disclosure pursuant to section 3(a)(1), (10) and (11) of the Open Records Act.

We will forward to you a copy of the file which contains the requested material for examination.

Please forward all correspondence related to this matter to Russell R. Oliver, General Counsel.

Thank you for your attention to this matter.

Sincerely,



Peter Potemkin
Executive Director

PP/vas

encl.

cc: Gene Fondren
Chairman, Governing Committee

cc: Russell R. Oliver
General Counsel

cc: Greg H. Walker
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